U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

INDEX

File: A43 951 822 - Otay Mesa

Date: AUG 18 1999

In re: DAVID RIVERA-BECERRA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Steven W. Brown, Esquire
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Encinitas, California 92024

ON BEHALF OF SERVICE: Marianne A. Pansa
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation

In a decision dated April 2, 1999, an Immigration Judge found the respondent removable as charged but granted the respondent's application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a) (Supp. II 1996). The Immigration and Naturalization Service ("Service") has appealed. The appeal will be sustained, and the record will be remanded to the Immigration Judge.

The record reflects that the respondent is a native and citizen of Mexico who entered the United States without inspection on April 1, 1991. His status was adjusted to that of lawful permanent resident on January 12, 1993, at the age of 17. On May 5, 1998, the respondent was convicted in the Municipal Court of California, County of San Diego, for the offense of possession of a controlled substance, to wit, methamphetamine, in violation of section 11377(A) of the California Health and Safety Code. On the basis of this conviction, the Service issued the respondent a Notice to Appear (Form I-862, Exh. 1), charging him with removability under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i) (Supp. II 1996), for having been convicted of a controlled substance violation. At a hearing on February 16, 1999, the respondent, through counsel, admitted to the factual allegations contained in the Notice to Appear and conceded removability (Tr. at 5-6; 14-15). Based on these admissions and the certified conviction records submitted by the Service (Exh. 2), the Immigration Judge found that removability had been established by clear and convincing evidence. See section 240(c)(3)(A) of the Act.

The Immigration Judge advised the respondent of his apparent eligibility for cancellation of removal. The Service objected, arguing that the respondent had not established the requisite 7 years of continuous residence in the United States. However, the Immigration Judge found that although the respondent entered without inspection in April 1991 and did not obtain permanent resident status until January 1993, the legal residence of his father, who became a lawful permanent resident on December 1, 1990, could be imputed to the respondent. In making this determination, the Immigration Judge relied on Lepe-Guitron v. INS, 16 F.3d 1021 (9th Cir. 1994), in which the Ninth Circuit Court of Appeals held that a child's "lawful unrelinquished domicile" is considered to be that of his parent for purposes of eligibility for a waiver under former section 212(c) of the Act, 8 U.S.C. § 1182(c) (1994). Calculating the respondent's period of legal residence from the December 1, 1990, date on which the respondent's father became a lawful permanent resident, the Immigration Judge found that the respondent had satisfied the 7-year residency requirement. She also found that the respondent warranted relief in the exercise of discretion and granted the application for cancellation of removal. The Service has appealed.

On appeal, the Service argues that the respondent is statutorily ineligible for cancellation of removal, as the respondent has not established that he has resided in the United States for 7 years after having been lawfully admitted in any status, as required under section 240A(a)(2) of the Act. The Service argues that Lepe-Guitron v. INS, supra, is distinguishable and thus does not govern the instant case. Instead, the Service contends that the respondent's period of residence should be computed from the January 12, 1993, date on which the respondent acquired permanent resident status, regardless of his father's status or length of residence. Under such an analysis, the respondent would be unable to establish 7 years of continuous residence in the United States after admission in any status, rendering him statutorily ineligible for cancellation of removal.

Section 240A(a) provides that a lawful permanent resident may seek cancellation of removal if the statutory prerequisites for that relief have been satisfied, which include that the alien

> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
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> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
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> (3) has not been convicted of any aggravated felony.

The record reflects that the respondent was admitted for permanent residence on January 12, 1993, and therefore he meets the first requirement of the statute. Furthermore, the Service does not allege that the respondent's conviction constitutes an aggravated felony. Thus, the only issue on appeal relates to whether the respondent has satisfied the requirement that he reside in the United States for 7 years after having been admitted in any status.

Pursuant to section 240A(d)(1) of the Act, 8 U.S.C. § 1229b(d)(1) (Supp. II 1996), the respondent's continuous residence or physical presence for cancellation of removal purposes is

deemed to have ended upon the April 9, 1998, commission of his crime. See Matter of Perez, Interim Decision 3389 (BIA 1999). This point is not contested by either party. Furthermore, according to the plain language of the statute, the period of continuous residence begins after the respondent has "been admitted in any status." Section 240A(a)(2) of the Act. Under section 101(a)(13)(A) of the Act, the term "admitted" refers to "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Therefore, while the respondent's entry without inspection in April 1991 does not qualify as an admission, it is clear that his adjustment to legal permanent resident status on January 12, 1993, does constitute an admission. However, the respondent had not accumulated 7 years of residence between that date and the April 1998 commission of his crime, and thus, he is statutorily ineligible for cancellation of removal under section 240A(a)(2) of the Act.

The Immigration Judge chose to calculate the respondent's period of continuous residence from the December 1, 1990, date of his father's admission as a lawful permanent resident. In support of this position, she relied on Lepe-Guitron v. INS, supra. We find such reliance to be misplaced. That case involved the interpretation of former section 212(c) of the Act, which provided that "[a]liens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, *and who are returning to a lawful unrelinquished domicile of seven consecutive years,* may be admitted in the discretion of the Attorney General . . . ." (emphasis added). The Ninth Circuit Court of Appeals held that a parent's "lawful unrelinquished domicile" is imputed to his or her child for purposes of establishing the child's eligibility for relief under section 212(c) of the Act. Lepe-Guitron v. INS, supra, at 1026.

However, we disagree with the Immigration Judge's finding that a parent's legal residency should likewise be imputed to a child for purposes of section 240A(a)(2) of the Act. Section 240A(a) of the Act contains no requirement of lawful domicile to qualify for cancellation of removal, only 7 years of continuous residence after admission in any status. We agree with the Service that the terms "domicile" and "resident" are two separate and distinct concepts which are not interchangeable. Although "domicile" is not defined by the Act or the regulations, the Ninth Circuit has adopted a definition of domicile consonant with its common law meaning, namely that "aliens must not only be physically present here, but must intend to remain." See Lepe-Guitron v. INS, supra, at 1025, quoting Castillo-Felix v. INS, 601 F.2d 459, 464 n.11 (9th Cir. 1979). The term "residence" is defined by the Act as "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." A review of the circuit court's analysis in Lepe-Guitron v. INS, supra, reveals that its rational for imputing the domicile of the parent to a minor was based in part upon the premise that "children are, legally speaking, incapable of forming the necessary intent to remain indefinitely in a particular place." Id. at 1025, citing to Mississippi Band of Choctoaw Indians v. Holyfield, 490 U.S. 30, 48 (1989). However, as stated above, "residence" does not require any intent. Thus, while minority may constitute a legal impediment to the formation of intent, it does not constitute such an impediment to the establishment of residence, which refers to the "actual dwelling place in fact, *without regard to intent.*" Section 101(a)(33) of the Act (emphasis added).

We acknowledge that in Lepe-Guitron v. INS, supra, the Court of Appeals implicitly imputed the years of the parent's residence to the child as well as the years of domicile. The Ninth Circuit had previously held that the 7 years of lawful domicile must accrue after the date an alien acquires permanent residence. See Castillo-Felix v. INS, supra. However, in Lepe-Guitron v. INS, supra, by imputing the parent's domicile, the child was deemed to have 7 years of domicile even though he was not a permanent resident during the entire 7-year period. The court explained that "while we have held it reasonable for the INS to interpret an adult's 'lawful unreliquished domicile' to begin on the day he or she acquires permanent residence," citing to Castillo-Felix v. INS, supra, at 467, "both the common law definition of domicile and the policies of section 212(c) preclude this interpretation when applied to children." Id. at 1025.

However, even if Lepe-Guitron v. INS, supra, can be read to ascribe the period of a parent's lawful residence to a minor child under section 212(c) of the Act, we find no basis for applying that reasoning to an alien seeking cancellation of removal under section 240A of the Act. Section 240A(a)(2) of the Act is clear in its requirement that the alien must "reside[ ] in the United States continuously for 7 years *after* having been admitted in any status" (emphasis added). By contrast, the language of section 212(c) is ambigious as to whether the 7 years of lawful unrelinquished domicile must follow the alien's lawful admission for permanent residence, which has led to a split in the circuit courts on this issue of statutory interpretation. However, no such ambiguity exists in section 240A(a)(2) of the Act. Where the statutory language is clear, "that is the end of the matter" and we "must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984); see also Matter of W-F-, Interim Decision 3288, at 5-6 (BIA 1996). As the Ninth Circuit issued its decision in Lepe-Guitron v. INS, supra, prior to the enactment of section 240A of the Act, it has not interpreted or considered the language at issue in the instant case. Accordingly, we are bound to uphold and apply the plain meaning of the statute as written.

For the foregoing reasons, we find that Lepe-Guitron v. INS, supra, is not controlling in the instant case. Thus, we agree with the Service that the respondent is statutorily ineligible for cancellation of removal under section 240A(a)(2) of the Act. Furthermore, we find that the respondent is statutorily barred from voluntary departure, the only other form of relief requested by the respondent before the Immigration Judge. Despite the Service's indication at the hearing that it would not oppose a grant of voluntary departure (Tr. at 59-60), the respondent is ineligible for such relief, as his controlled substance conviction precludes him from establishing good moral character. See section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3) (Supp. II 1996); section 240B(b)(1)(B) of the Act (Supp. II 1996). However, we note that the respondent was not notified of his right to designate a country of removal, as required by section 241(b)(2) of the Act, 8 U.S.C § 1231(b)(2) (Supp. II 1996), and the regulations at 8 C.F.R. § 240.10(f) (1999). The Court of Appeals for the Ninth Circuit, the circuit in which this case arises, has held that an alien's right to designate a country of deportation is a substantive right, and failure to afford an alien this right is reversible error. Bui v. INS, 76 F.3d 268 (9th Cir. 1996). Therefore, we will remand the record to the Immigration Judge to provide the respondent an opportunity to make such a designation.

ORDER: The Service's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

FOR THE BOARD